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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 910

A. J. SIMLER,
Petitioner,

VERSUS

LESLIE L. CONNER and PHILLIPS PETROLEUM COMPANY, a corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN B. OGDEN
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Oklahoma City, Oklahoma
Attorney for Petitioner

December, 1965

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8780

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LESLIE L. CONNER and PHILLIPS PETROLEUM COMPANY, a corporation,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Comes now the above named Petitioner and petitions this Court to grant a Writ of Certiorari and review the opinion of the United States Court of Appeals for the Tenth Circuit, dated October 11, 1965. A copy of the opinion is set forth in full in the Appendix hereof and marked "A".

Jurisdiction of this Court is envoked under 28 U.S.C. 1254, paragraph No. 1.

A petition for rehearing was filed in the United States Court of Appeals Tenth Circuit and denied on November 24, 1965.

STATEMENT OF FACTS

This is a suit between A. J. Simler, formerly a client of Leslie L. Conner, seeking a declaratory judgment for the purpose of determining what is a reasonable attorney's fee. The petitioner paid the respondent, Leslie L. Conner, $74,000.00 in cash. This controversy has heretofore been before this Court. See *Simler* v. *Conner,* 83 S.Ct. 609, 372 U.S. 221, 9 L.Ed.2d 691.

I

The binding effect of a pre-trial agreement upon the Trial Judge presents the question of due process of law.

After this Court granted the petitioner a jury trial and when the case came on for pre-trial before Judge Bohanon, a discussion was had and a jury was waived under the pre-trial agreement that a reasonable fee would be fixed in money and there would be no interest or percentage in the property but would be a reasonable cash fee. We, therefore, ask the Court to read the Appendix "B" which sets forth the conditions under which a jury was waived and under which condition and agreement the case was to be tried.

The case involved, a will contest which was lost in the Supreme Court of Oklahoma, but the Circuit Court of Appeals, 210 F.2d 99, held that Mr. Simler being the only heir at law of Birdine Fletcher, deceased, would take the farm lands by reason of the disqualification of a corporate beneficiary being unable to take.

The question now presented to this Court is the binding effect of a pre-trial agreement and we cite the following:

Moore's Federal Practice, Second Edition, pages 1126 and 1127, Notes 4, 5, and 6.

The letter referred to in the pre-trial agreement and upon which it was agreed the case would be tried is, as follows:

"July 18, 1952.

"Mr. Leslie L. Conner, Atty., 410-414 Hightower Bldg., Oklahoma City, Oklahoma.

"Dear Sir: Re: Birdine Fletcher Estate County Court, Oklahoma County, Okla.

"This confirms our employment of yourself and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

"We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court reporters, prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the neighborhood of approximately $1,000.00.

"We also agree to pay you and your firm a reasonable attorneys fee for the services rendered and to be rendered in this case in the County Court, and if necessary, in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which

fee may be set by the County Court or any other court if the matter is successful either by trial or judgment or compromise.

"If the matter is not won, compromised or settled, you are not to charge us a fee.

"Yours truly,

"/s/ A. J. Simler

"A. J. Simler, for himself and his children."

Fact that pre-trial order was not formally signed does not prevent it from being valid. *Robertson* v. *Malone,* 190 F.2d 756; *Sinclair Refining Company* v. *Howell,* 222 F.2d 637; *Frank* v. *International Canadian Corp.,* 308 F.2d 520, holding substantially that pre-trial order is binding in absence of request for amendment or modification at time of trial.

A jury was waived relying upon the pre-trial agreement. The Trial Judge rendered a judgment for the sum of $290,975.59.

The Trial Judge's opinion is found in 228 F.Supp., page 127.

In order for this Court to determine under what conditions a jury was waived, and what was the pre-trial agreement, we have copied from the record in the Court of Appeals, and the same is shown in Appendix "B" hereof.

Order based on pre-trial conference, crystallizing issues of law and fact is binding upon the court. *Montgomery Ward & Co.* v. *Northern Pac. Terminal Co.,* 128 F.Supp. 520.

Where pre-trial order never became sufficiently definitive for a trial, judgment would be vacated and case remanded with instructions to set aside findings, conclusions and pre-trial order. *Plastino* v. *Mills*, 236 F.2d 32.

We, therefore, feel that the judgment was unauthorized and that it violates the pre-trial agreement, and deprives the petitioner of due process of law.

II

The disregarding of State law in fixing of attorney's fees constituted denial of due process of law.

Title 5, Section 7, Oklahoma Statutes Annotated, limits the amount of recovery as attorney's fees to fifty (50%) per cent. The statute is, as follows:

> "It shall be lawful for an attorney to contract for a percentage or portion of the proceeds of a client's cause of action or claim not to exceed fifty per centum of the net amount of such judgment as may be recovered, or such compromise as may be made, whether the same arises excontractu or ex delicto, and no compromise or settlement entered into by a client without such attorney's consent shall affect or abrogate the lien provided for in this chapter. 1 R.L. 1910, § 248."

The reasonable market value of the property involved and the highest market value as fixed by Mr. Edinger, a witness for the respondent, was $250,000.00. We are attaching hereto in the Appendix excerpts from the testimony of Mr. Edinger. The property was appraised in the State Court Probate Proceedings at $150,000.00 and then appraised by the Federal Government for Estate Tax pur-

pose at $176,000.00. The highest value placed on the property during the trial was by the witness, Mr. Edinger, which testimony is set forth in the Appendix "C".

It will, therefore, be seen that the judgment rendered exceeded what the property could be sold for today and violated the statute of Oklahoma in the fixing of lawyer fees in excess of fifty (50%) per cent of the recovery.

III

Basing the judgment on speculation, conjecture, and uncertainty as denying due process of law to the petitioner.

In order for the Court to fully understand the grave injustice of basing the judgment on speculation, conjecture, and uncertainty as to the value of the property involved, a very material element in determining the attorney's fees, we have attached hereto, as Appendix "D", excerpts from the testimony of the witness Edinger and upon which the judgment in this case was based.

After looking at this testimony, the Court can readily see that this petitioner has been required to pay an attorney's fee basing value of property recovered upon speculation, conjecture and uncertainty, which is a violation of established law and certainly wholly unjust. While Mr. Edinger gave the court a figure as to value of $779,480.00, he admitted that this figure was not an equal value, being a speculative value, and admitted further that it would be necessary to deduct from $779,480.00 which would be under his testimony a value of $296,480.00 and the Court will note that this witness said this sum would be the

present worth, what we call the present worth of the property.

He further testified that in his opinion, the property was worth $250,000.00. The judgment in this case exceeds the value of the property by $40,973.59.

We call the Court's attention to the following cases which, we think hold beyond a question of a doubt, that a judgment to be a judgment must be definite as to amount and cannot be left without knowing how much money a person is to receive under a judgment. We start with C.J.S., Vol. 49, page 159, Article 76, which is in part as follows:

> "A judgment for money must specify with definiteness and certainty the amount for which it is rendered, and should be so worded as to avoid the possibility of a double recovery, there can be no judgment payable by installments. It has been said that a judgment includes all amounts for which execution may properly issue. A judgment for an amount left blank, or otherwise wholly uncertain, is at least erroneous, and according to a number of decisions such a judgment is void; but according to another authority failure sufficiently to designate the amount renders the judgment merely irregular and erroneous, and not void * * *.
>
> "In Dray v. Crich, 3 Or. 298, this court said: 'It is of the gravest importance that, when a final judgment is rendered, the record shall be definite and certain, and show unequivocally what matters have been adjudicated, and that the decision shall be a finality in regard to the matters in issue.'

"This precept is cited with approval in Schmid v. City of Portland, 83 Or. 583, 591, 163 P. 1159. See, also, Dickerson v. Walker, 1 Ala. 48, Alexander v. Leland, 1 Idaho 425, and Boyken v. State, 3 Yerg. (Tenn.) 426. In 33 C.J. 1196, Para. 129, it is stated: 'IT IS A GENERAL RULE THAT JUDGMENT MUST NOT BE CONDITIONED UPON ANY CONTINGENCY, AND IT HAS BEEN HELD THAT AN ALTERNATIVE OR CONDITIONAL JUDGMENT IS WHOLLY VOID.' In support of this statement, are cited the cases of Puette v. Mull, 175 N.C. 535, 95 S.E. 881; Strickland v. Cox, 102 N.C. 411, 9 S.E. 414; and Dunn v. Barnes, 73 N.C. 273." (Emphasis ours.)

CONCLUSION

WHEREFORE, the petitioner most respectfully asks this Court to grant a Writ of Certiorari herein; and order a new trial or such other relief as may appear proper herein.

Respectfully submitted,

JOHN B. OGDEN
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Oklahoma City, Oklahoma
Attorney for Petitioner

December, 1965

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM, 1965

A. J. SIMLER,

Appellant,

v.) Number 7822

LESLIE L. CONNER and PHILLIPS PETROLEUM COMPANY, a corporation,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

John B. Ogden for Appellant:

Phil E. Daugherty and Paul C. Duncan (Leslie L. Conner, James M. Little, Irvine E. Ungerman and Leslie L. Conner, Jr., on the brief) for Appellees.

Before PHILLIPS, BREITENSTEIN and HILL, United States Circuit Judges.

HILL, Circuit Judge.

This declaratory judgment action was brought below by appellant, Simler, against appellee, Conner, asking the court to fix and determine attorney fees, due Conner from Simler, under a contract between the parties. The trial court, after a jury had been waived, made such determination and Simler has appealed. The litigants are not

strangers to this court, as this case is only a part of the final chapter in a long story of litigation in the State Courts of Oklahoma and the Federal Courts. To put the present controversy in proper perspective, a brief history of the litigation must be recounted.[1]

Birdine Fletcher, a sister of Simler, died testate in Oklahoma in 1952. By the terms of her will, Simler, who otherwise would have inherited the entire estate as her only heir at law, received "$1.00, this amount and no more." All of her property, which was very substantial, was left to strangers. Simler employed Conner in July, 1952, as an attorney to contest the will. This employment is evidenced by two letters, one dated July 18[2] and the other September

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[1] See the trial court's findings of fact in Simler v. Conner, 228 F. Supp. 127, for detailed history of the litigation.

[2] "July 18, 1952.

"Mr. Leslie L. Conner, Atty., 410-414 Hightower Bldg., Oklahoma City, Oklahoma.

"Dear Sir: Re: Birdine Fletcher Estate, County Court, Oklahoma County, Oklahoma,

"This confirms our employment of yourself and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

"We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court reporters, prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the approximate neighborhood of $1,000.00.

"We also agree to pay you and your firm a reasonable attorney fee for the services rendered and to be rendered in this case and in the County Court and if necessary, in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court or any other court if the matter is successful either by trial or judgment or compromise.

"If the matter is not won, compromised or settled, you are not to charge us a fee.

"Yours truly,
"/s/ A. J. Simler
"A. J. Simler, for himself and his children."

25,[3] in 1952. The validity of the will was thereafter unsuccessfully contested in the County Court of Oklahoma County, the District Court of that County and the Supreme Court of Oklahoma.[4] In October, 1952, while the attack upon the competency of the testratrix, as it affected the validity of the will, was being litigated in the state courts, Conner conceived the legal theory that the foreign corporations named as devisees and legatees in the will could not take title to the property in the estate because of a provision in the Constitution of the State of Oklahoma. He then filed a diversity suit in the United States District Court for the Western District of Oklahoma on behalf of Simler against the executor of his sister's will and the foreign corporations on this theory. After adverse judgments in that court, Conner and his associates appealed the case to this court, obtained a reversal of the district court

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[3] "Mr. Leslie L. Conner, Conner, Hilpirt & Britton, Attorneys and Counsellor at Law, 410-414 Hightower Building, Oklahoma City, Oklahoma.

"Dear Sir: With reference to my letter of July 18, 1952, employing your firm in the Fletcher Will and Estate Contest, I agree that the reasonable fee is:

"25% of the amount recovered if settled without trial.

"33% of the amount recovered if case is tried in County and District Court.

"50% of the amount recovered if the case is appealed to the Supreme Court.

"I understand that all expenses, taxes and costs are to be deducted first.

"This is a contingent fee and if nothing is recovered, no fee is paid.

"If anything is recovered or settled, I agree to pay you the above fees.

"Yours truly,
"A. J. Simler"

[4] Simler v. Wilson, et al., 269 P.2d 349.

thereby procuring the entire estate for Simler, as the sole heir at law of the decedent.[5] A petition for certiorari was eventually denied by the Supreme Court and soon thereafter distribution of the entire estate to Simler began.

By the very nature of the action Simler acknowledges that Conner and his associates in the litigation are entitled to an attorney fee. The only question presented here is whether the attorney fee fixed and determined by the court below is a reasonable one. At the outset of our determination we are confronted with the uniformly accepted doctrine that a judgment of a trial court will not be disturbed upon appeal unless it can be concluded that the material findings of fact are clearly erroneous or that the trial court has erroneously applied the law.[6]

The trial court determined that a reasonable contingent attorney's fee for all of the legal services rendered by Conner and his associates to Simler to be 50 per cent of the June, 1957, Value of the property recovered. And further that the 50 per cent should be reduced to 36 per cent because of a settlement made between Simler and one of the associates, whose share of the total fee was to be 14 per cent.

In determining a reasonable attorney fee some of the factors to be given consideration are: (1) Is the fee to be a contingent one; (2) how much is involved in value in the matter; (3) what benefit has accrued to the client; (4) what degree of professional skill and experience was displayed by the attorney; and (5) what amount of time and expenses were spent by the attorney on the matter.[7] Also,

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[5] Simler v. Wilson, 10 Cir., 210 F.2d 99, cert. denied 347 U.S. 954, rehearing denied 347 U.S. 973.

[6] Walker v. Wiar, 10 Cir., 276 F.2d 39; Rule 52, F. R. Civ. P.

[7] Wyoming Ry. Co. v. Herrington, 10 Cir., 163 F.2d 1004; Miller, et al. v. Burkett, 191 Okl. 521, 130 P.2d 996; Driver v. Tolstornog, — Okl. —, 358 P.2d 1108; 7 C.J.S. § 191, p. 1080.

the allowance of attorney fees is generally a matter within the sound judicial discretion of the judge and an appellate court is not warranted in overturning the trial court's judgment unless under all of the facts and circumstances it is clearly wrong.[8]

Expert testimony was adduced at the trial and from such testimony on behalf of Conner we have no hesitancy in holding that there is ample evidence in the record to support the court's allowance of a 50 per cent total fee as a reasonable one. Two experienced, qualified and outstanding members of the Oklahoma Bar, Mr. Paul Brown and Mr. Gus Rinehart, testified as experts for Conner. Both witnesses possessed a knowledge of the nature and extent of the litigation involved and unequivocally fixed a reasonable fee at 50 per cent of the value of the property recovered. Even one of the appellant's expert witnesses fixed a reasonable fee in the case at 50 per cent and appellant's other expert acknowledged the fine quality of the legal services rendered. In addition, one of the exhibits, which is set out in full at foot-note 3, a letter from Simler to Conner written at the inception of the litigation, shows an agreement by Simler to pay a 50 per cent fee based on the amount recovered. The parties agreed that this letter would not be relied upon by Conner as determinative of the fee to be allowed but it was admitted into evidence and shows that Simler was agreeable to a 50 per cent fee at that time and that he apparently did not consider such a fee execessive. It should also be noted that the balance due Conner is not to be paid in cash immediately but will be paid from 36 per cent of the oil payments accruing monthly from the farm. From the trial court's opinion it is evident that, in addition to the exceptional factual situation presented, he gave consideration to all of the factors set forth above and

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[8] United States v. Anglin & Stevenson, 10 Cir., 145 F.2d 622, cert. denied 324 U.S. 844.

to the Canons of Professional Ethics adopted in Oklahoma, Title 5, Chapter I, Appendix 3, Oklahoma Statutes, 1961. Oklahoma, by statute, expressly authorizes 50 per cent contingent attorney fees. Title 5, § 7, O.S.A. Cases approving 50 per cent contingent fees are too numerous to be set forth here, but all of the cases on the reasonableness of attorney fees teach that the particular facts of each case must determine what a reasonable fee will be. It should also be pointed out that appellant, after receiving the fruits of appellee's skilled legal efforts, did not choose to fully compensate appellee but brought this action instead. That has been eight years ago and appellee has been deprived of the use of his well earned fee, or of interest upon the money he was entitled to, for that period of time. Clearly, the evidence in this case supports the findings of the trial court.

The trial court, after determining that 50 per cent of the value of the property obtained was a reasonable attorney's fee, then proceeded, under the evidence, to fix a value of the property as of June 1, 1957, the date of the completion of Conner's services. The property obtained for Simler through this long series of lawsuits consisted of a quarter section of land, subject to an oil and gas lease, with sixteen producing oil and gas wells thereupon and accumulated oil and gas runs therefrom. The trial court put a value of $12,000 upon the surface rights of the quarter section and a value of $779,480 upon the proved primary and secondary oil and gas reserves and undeveloped oil and gas reserves above a 6400 foot level below the surface. Apparently, no question is raised as to the value of the surface rights to the farm but appellant attacks the oil and gas valuation and says that the trial court used speculative and unreasonable figures in arriving at this valuation figure. We have carefully read all of the expert testimony adduced at the trial and do not agree with appellant. Again it is our view that this finding of the trial judge is amply and sufficiently supported by the evidence.

In regard to this valuation, the evidence shows that this 160 acres is part of a unit consisting of 3700 acres with 5.37 per cent assigned to it as its share of production from the entire unit. Even though the wells on the Simler land go dry the owner will be entitled to share in production from the entire unit. Simler has either received or has become entitled to receive more than $382,000 from oil and gas runs from this farm since acquiring the title to it and the undisputed evidence further shows that the property, since 1952, has produced income in excess of $475,000.

Appellee's two expert witnesses placed June, 1957, values on the oil and gas reserves at $779,433 and $627,893, without giving any particular value to the unexplored horizons under the land. The evidence also showed that the right to explore unexplored horizons below 6400 feet has considerable value.

Appellant puts stress upon the pre-trial proceedings and order to support his contention that the judgment, as rendered, violates what the parties had agreed upon.[9] We find no merit to this contention. It is true that the parties agreed that Conner would not be given an interest in the property in payment of any fee due him. The judgment is in keeping with this agreement but it does properly give Conner a lien upon 36 per cent of Simler's interest in the minerals and mineral rights above 6400 feet until the full amount due Conner is paid.[10] By the judgment, Conner is

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[9] The findings of fact show the following:

"* * * At pre-trial conference it was stipulated by the parties and their attorneys that defendant would not rely on the contract of September 25, 1952, but that the contingent attorney's fee should be fixed by the Court, without a jury, to be paid in money only, and that Conner and his associates relinquished their rights to any interest in the real estate above described and the oil and gas production therefrom, except as hereinafter stated."

[10] Title 5, § 6, O.S.A., expressly provides for an attorney's lien for services in Oklahoma.

expressly precluded from any interest in the mineral rights below the 6400 feet horizons, except that his lien would apply to production from these horizons if such be had. We do not believe that this lien provision violates the pre-trial agreement or order, because it gives Conner no ownership in the land or mineral rights. The lien is consistent with the colloquy had between courts and counsel at the pre-trial conference.[11]

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[11] At the pretrial conference on December 17, 1963, the following discussion was had:

"The Court: Well, I want you to understand and I want him to understand that if you do that, that the Court, in fixing a cash fee for these lawyers, will have some determination of reserves to determine the amount of probable production dollar-wise from that property.

"Mr. Ogden: Yes, sir.

"The Court: And go from there to determine the amount of cash they are to receive, and fix the lien upon that payment.

"Mr. Ogden: Yes, I know he—I know to protect their fee, whatever judgment.

"The Court: To protect their fee down through the time until it's paid, and when it's paid, why, he's got his farm free of any payment, and then you should figure that that payment should be based on a certain percentage of the earnings, because he's going to want some of it, probably himself. What do you say about this, Mr. Duncan."

Then at a pretrial conference on December 27, 1963, there is another mention of a lien:

"Mr. Ogden: Your Honor, on that case I'd like to be positive—I think I am, but that I understand this. Now since I talked to your Honor the other day in the courtroom when we had the pre-trial, I've gone to Little Rock, North Little Rock and talked to Mr. Simler, and I told him and I think this is correct that if we waived a jury in this case, the Court would not consider the second letter, or any interest in his property, but only fix a reasonable lawyer fee in money. Is that the understanding you people have?

"Mr. Little: Yes, sir, that was agreeable with us if they waived a jury and that you could set a cash fee to be paid out of what's accumulated and then if it was more than what's accumulated to be paid as it accrued from the farm, and that we would not claim any interest as such in the minerals or the surface of the farm.

"Mr. Ogden: We understand—

"Mr. Little: We'd like it to be secured on the payment of any fee."

Appellant complains about the trial court's use of the date, June, 1957, in fixing the value of the property acquired. We agree with the trial court. The date used was the actual time when appellant came into possession of the property by distribution from the estate. He further urges that the judgment is indefinite and with that argument we do not agree. We will not set out the judgment here or unduly lengthen this opinion by attempting to summarize it because it is fully set out in the trial court's published opinion, Simler v. Conner, supra. We have carefully read it and conclude that it is definite, clear and unambiguous.

We have very carefully considered the entire record before us and agree fully with the trial court's disposition of this long pending litigation. The allowance is not unconscionable and is clearly within the bounds of the evidence that was before the trial judge. He certainly did not abuse his discretion in the matter.

AFFIRMED.

APPENDIX "B"

"* * * Mr. Duncan: May I say something to the Court now?

The Court: Yes.

Mr. Duncan: When Mr. Ogden made his last statement to the Court he stated that the contractual relationship that should prevail in this matter would be the contract which was made on July the 18th, 1952, which was the first letter from Mr. Simler to Mr. Conner.

The Court: Yes.

Mr. Duncan: Now if he takes that position in all seriousness before this Court, then on behalf of my client I make this statement for the record. That letter provided that the attorney fee should be fixed by a Court, any Court, and if he is relying upon that letter, we will be glad to rely upon it ourselves, and ask that this Court fix a reasonable attorney's fee in this matter and bring it to an end, because that's what the letter of July the 18th provides; and we ought to get this litigation behind us. If he wants to rely on it, we want to rely on it and let the Court decide the fee.

This matter has been pending far too long. Mr. Simler is an old man, and will not have any of the fruits of the balance of this money, although he's had over $100,000.00; he ought to have the rest of what he is entitled to during his lifetime. Mr. Conner and Mr. Daugherty should have their fees and not be required to wait an interminable period of time to get that which has been earned.

So if he wants to do that, we are willing to submit this case to the Court on the letter of July the 18th, 1952.

The Court: And what do you say about that, Mr. Ogden?

Mr. Ogden: And disregard all other letters?

Mr. Duncan: Try the lawsuit only on a reasonable fee before this Court.

Mr. Ogden: Well, now, let me be positive I understand it, because if Mr. Simler is able I'll just go over to Little Rock and see him. You might have fixed up a deal right there that we'd agree to. If I understand it, so I'll be positive about it, I don't want to be technical, but you are willing to try this case and leave it up to the Court to determine how much a reasonable fee is in money under this letter of July the 18th, 1952?

Mr. Duncan: Well, I don't think we have a misunderstanding, because I think Mr. Ogden means what my client means, but they want to be sure that it's the total recovery which was obtained by their actions, including money, land and everything. They will take their fee in money but they want everything considered by the Court that was accomplished. Isn't that what you mean?

Mr. Ogden: That's what I meant. That's just what I was trying to find out. Just pay you a reasonable fee. The only thing that I would know that you could pay something with would be money.

Mr. Duncan: Whatever the Court fixes the fee and however it's to be given to them would make no difference if it would be decided land or money, but the entire recovery is what they are concerned with.

The Court: The Court is very concerned about the stipulation that you gentlemen will enter into to waive a jury and try it to the Court. The fee contemplated

of July 18, 1952, of a reasonable fee of all that's recovered, that would be, of course, the farm, the surface, the minerals and what have you? Now then if Mr. Ogden is talking about money alone, in order for the Court to give a reasonable fee, based upon the value of the recovery, whether it be land or minerals or reserve minerals or reserve oil, I'd have to have some kind of a report showing how much the reserves are.

Mr. Ogden: Sure.

The Court: Because the cash fee would be based upon the reserves the same as cash that is produced.

Mr. Ogden: Sure.

The Court: Be in dollars, but I think you gentlemen are making some steps. I can decide the case and I think I can decide it fairly.

Mr. Ogden: I think you could, if Your Honor please. What I wanted to know and what I wanted to be positive about, see the letter of the 25th says percentagewise, the letter that, see, certain amount of, you've heard my position on it; but, nevertheless, the first letter of the 18th said a reasonable fee.

The Court: Yes.

Mr. Ogden: Now, what I would contemplate if somebody said he would pay me a reasonable fee, that they would pay me in money and that's what I thought that, then I wouldn't want to try the case out on the theory that they were going to take a portion of the land for the lawyer fee, if the Court found they were entitled to a lawyer fee. I would just go upon the theory that if the Court would fix, and that's what I wanted to be positive about before I talk to Mr. Simler if I'm able to talk to him, I don't know that I can

now, but I want to talk to him because I want to know positive I know.

The Court: I want to ask you this: I understand what you're talking about—what is the difference in a reasonable fee in money and minerals and money or land and minerals or money based upon money, land and minerals?

Mr. Ogden: Well, if the Court please, so you might better understand why I am making even these statements, my client don't want to give up a inch of his land to anybody, or minerals. He wants that.

The Court: Well, in my thirty-five years of practicing where I had title questions and took it on a contingent fee, I got part of that minerals, I got part of the surface and I got part of that farmhouse and the barn and the wells and everything else. Now then, if you're going to take him out of that, you've got to determine the amount of reserves.

Mr. Ogden: Yes, sir.

The Court: And take the cash based upon the reserves, and I think it's all six one way and a half dozen the other. You can put it on reserves or you can put it on so much of an oil payment, pay it out some other way, that in the end the adjustment is fair, equal and just.

Mr. Ogden: He said, 'I agree.' That says, 'I agree to pay you a reasonable fee.' Now if you find that in a contract with a client and a lawyer, that means in money. You don't have to put down there 'in money,' because it says, 'I'll pay you a reasonable fee.' You could pay him in chickens or cattle or horses. You'd have to pay him in money or land, is my construction of it; and that's what I want to be able to tell Mr. Simler when I talk to him, that if the Court found

that he owed additional fees, the Court would fix a certain amount of money and order it paid, give judgment for that.

The Court: Well, I understand that. If the Court is given latitude in your stipulation, that a reasonable fee would be based upon the value of the farm, the land and the reserve minerals, that's all right, but I wouldn't want to be put in a box.

Mr. Ogden: No.

The Court: Of doing what you might think would be unfair, if I'd be relegated to the amount that's accumulated in the hands of Phillips now, and in the hands of the clerk, to fix the fee.

Mr. Ogden: Well, if the Court please, I'd just say this to the Court, that of course—I am not sure—that when you fix a lawyer fee in anything, you take the amount involved, and the likelihood of winning or not winning, whether it's a contingent or fixed fee, and the value of whatever benefits you do for your client, whatever you get for him, you know that would help him.

The Court: The skillfulness in which the matter was handled and the success.

Mr. Ogden: The success, that's correct. Our Bar Association has laid down recently some rules in the Bar Journal along that line which, of course, have always been the rules, but anyway it just refreshed my mind and that's the way I remembered it.

But my client, as I have heretofore stated, is eighty-five years old or eighty-six, I can't remember which, the last August the 8th and is in the hospital. I have to go talk to him. I can't just call him up over the phone or write him a letter and make him understand it; but if I understand it correctly that, you see,

we then just wipe out everything after the letter of July the 25th, and say that there will be nothing offered in evidence as to that as far as documents are concerned, except we will offer in evidence what you people did, and the values, what kind of work and so forth.

The Court: You're talking about trying it to a jury?

Mr. Ogden: No, I mean if we tried it to the Court.

The Court: But I already know about all these things.

Mr. Ogden: I know, but insofar as we wouldn't offer them in evidence they wouldn't be pertinent. We are just trying it on the letter of July the 18th, reasonable fee, and to be fixed in money. Now if I could go tell him that, I think, if Your Honor please—of course, I'm not authorized to waive the jury for him without talking to him, but I believe he'd waive a jury.

The Court: Well, I want you to understand and I want him to understand that if you do that, that the Court, in fixing a cash fee for these lawyers, will have some determination of reserves to determine the amount of probable production dollarwise from that property.

Mr. Ogden: Yes, sir.

The Court: And go from there to determine the amount of cash they are to receive, and fix the lien upon that payment.

Mr. Ogden: Yes, I know he—I know to protect their fee, whatever judgment.

The Court: To protect their fee down through the time until it's paid, and when it's paid, why, he's got

his farm free of any payment, and then you should figure that that payment should be based on a certain percentage of the earnings, because he's going to want some of it, probably, himself. What do you say about this, Mr. Duncan?

Mr. Duncan: We are in accord with that. I think it would be easy enough to determine the reserves and make a stipulation. If not, you can hear evidence as to what the reserves are and the value of the property. My clients are perfectly willing to have the fee in a money judgment, or if he wants all of the real estate, as long as it's considered and its value and the reserves are all considered in the Court's determination of the fee.

The Court: Well, if we can settle this matter in a way that's agreeable to the parties, Mr. Simler and Mr. Conner and those interested by settlement, it's far better to end this contract that way, I think, than to hammer and tongs it out before a jury and all of that work and trouble, but I am willing to go either way. I can sit here for a week putting on evidence and hearing it and I won't wear out, and I'll be with you as long as you want to try it, anyway you want to try it, but I do think that it's time that this lawsuit is put at rest.

All right, then what do we want to do? If that's agreeable and you understand each other here in open court, here it's the 17th.

Mr. Duncan: How much time would you need to confer with your—

Mr. Ogden: Well, if Your Honor please, would it be asking too much of you and opposing counsel to pass this over to a further pre-trial on some specified date that suits Your Honor, and then if Mr. Simler—

of course, he could get worse and might even pass away, you can't tell, but if he is able to talk, why if it's necessary I'll just drive over to Little Rock and go to his house and talk to him and explain the matter to him and tell him that whatever judgment the Court thinks is right, the Court will fix it, and that it will be in money, but that it will be also a lien upon his property, so I'll just explain that to him, so that's all there would be to it.

Mr. Duncan: How much time do you want?

Mr. Ogden: Well, I was just going to say that this is the 17th day, and of course the rest of this week is just about three days. I know I couldn't do it then because I don't imagine I could talk to him. He's still in the hospital. So then next week is Christmas week, and if you could give me until about the 10th of January, somewhere in there, I think, you know I'd just have to run in when I can, when he's able to be seen and when I'm able to get away.

The Court: I was going to suggest the 27th of December.

Mr. Duncan: That's right, because the Court is contemplating a jury docket, are you not?

The Court: Yes, that's right. * * *"

December 27, 1963

"The Court: The first case on the pre-trial docket is 8008-Civil, A. J. Simler vs. Leslie L. Conner, et al. Are the parties ready to proceed with the pre-trial in that case?

Mr. Little: We are ready, Your Honor.

Mr. Ogden: Yes sir.

The Court: Very well.

Mr. Ogden: Your Honor, on that case I'd like to be positive—I think I am, but that I understand this. Now since I talked to Your Honor the other day in the courtroom when we had the pre-trial, I've gone to Little Rock, North Little Rock and talked to Mr. Simler, and I told him and I think this is correct that if we waived a jury in this case, the Court would not consider the second letter, or any interest in his property, but only fix a reasonable lawyer fee in money. Is that the understanding you people have?

Mr. Little: Yes, sir, that was agreeable with us if they waived a jury and that you could set a cash fee to be paid out of what's accumulated and then if it was more than what's accumulated to be paid as it accrued from the farm, and that we would not claim any interest as such in the minerals or the surface of the farm.

Mr. Ogden: We understand—

Mr. Little: We'd like it to be secured on the payment of any fee.

The Court: Well, the way to do that is to prepare a pre-trial order and set out; you gentlemen agree to it and the Court will abide by any agreement you make, of ocurse.

Mr. Ogden: Now then, if Your Honor please, I talked to Mr. Simler about that and he asked me to have one other provision incorporated in it, and that was the fact that we are waiving a jury before Your Honor, but if the case should for any reason be transferred—I believe this is either three or four times—before some other judge, he might not feel that he would want to waive a jury, but I understand it's going to be tried to Your Honor.

The Court: If I live, I will try it.

Mr. Ogden: All right, sir. Anyway that's what he asked me. Now, if the Court please, under those conditions, we now waive a jury.

The Court: All right.

Mr. Ogden: Now that's out of the way.

The Court: Let the record show that plaintiff waives a jury and we will try the case on its merits to the Court.

Mr. Ogden: Yes, sir.

The Court: With the understanding that the Court is to make such award as the Court may find proper under all the circumstances, for attorney's fees in dollars.

Mr. Ogden: That's correct.

The Court: Provided that it be paid out of what's accumulated, or a portion out of what's accumulated, and a portion out the earnings, put in the stipulation how you want the Court to handle it. My duty is to fix the figure, and it will be your duty to fix how that figure is to be paid, I assume, or I can do it.

Mr. Ogden: If the Court please, we would much prefer just to leave the matter in your hands. You can fix the lien on the property or anything that you felt like would be proper. In other words, I don't think there will be any question about the Court being able to fix the lien, enforce the judgment, couldn't be any question about that, so they'll get their money, whatever the Court allows them. * * *"

APPENDIX "C"

A. "* * * Now the $779,480 that I computed as being the value of the sale of the oil and gas from these properties would have to be discounted at 5%, which would amount to approximately $483,000, discounted.

Q. Have to knock $483,000 off of that?

A. No, sir, that would be the discounted or present worth, what we call a present worth of the property.

Q. All right, sir. That would be present worth, but how much could you sell it for on the market?

A. SOME FRACTION OF THAT, AND THEN WE GET INTO THINGS THAT ARE PRETTY NEBULOUS AND I CAN ONLY ANSWER THAT IN GENERAL TERMS.

GOOD PRODUCING PROPERTIES THAT HAVE AN ESTABLISHED DECLINE, AND THERE IS LITTLE OR NO SPECULATIVE VALUE, SPECULATION INVOLVED IN IT, COULD—IT'S FREQUENTLY SOLD FOR TWO-THIRDS OF THE PRESENT WORTH, WHICH IN MY OPINION IN THIS PARTICULAR CASE WOULD BE IN THE ORDER OF $324,000.

Q. SO IT WOULD GO DOWN IF YOU WERE GOING TO SELL IT FROM THE $700,000-AND SOME YOU MENTIONED TO $324,000, IS THAT RIGHT, SIR?

A. YES.

Q. WOULD YOU PUT YOUR ANSWER SO THE REPORTER CAN PUT IT IN THE RECORD?

A. YES SIR, THAT IS CORRECT.

Q. (By Mr. Ogden) I didn't ask you one question, and I would like to ask it. How much will you give for that lease right now, in the shape it's in, as an oil man?

A. How much would I pay for the lease right now?

Q. Today, or any time in the next few days?

A. Well, I couldn't afford to pay what I think it's worth, but I would recommend to one of my clients at least $250,000 * * *."

APPENDIX "D"

"* * * Q. This property, every time you take out a barrel of oil, it's just like any other property, it's worth just that much less, is it not?

A. Yes, that's right.

Q. Isn't that correct?

A. Yes, sir.

Q. Now then, so what would you say, knowing what this property you say produces there—you have a record there and you've given it to the Court—now and you know what the price of oil is, $2.81 a barrel, and considering that, what do you say this property was worth that you could sell it for on the market? Not what you might get twenty years from now—just reasonable market value?

A. That's an extremely difficult question to answer, sir, and in what I say I am going to have to qualify myself in several respects.

Actually, of course, I have been a party to buying and selling reserves or representing my clients in

negotiations for reserves, and I see all types of yardsticks used.

I think probably one of the best is to use what we call the discounted value or the present worth of the property, and take some reasonable fraction of that present worth, taking into account the speculative nature of the oil business.

That of course is not one that is necessarily used. Actually whatever a seller can agree on, that's it; but coming back to your question, if I were asked to give an opinion on the fair market value of the reserves in the middle of 1957, I would be inclined to take the discounted value at 5% interest compounded annually and, first, compute the present worth over a period of approximately twenty years, which in my opinion—then take some fraction of that value.

Now the $779,480 that I computed as being the value of the sale of the oil and gas from these properties would have to be discounted at 5%, which would amount to approximately $483,000, discounted.

Q. Have to knock $483,000 off of that?

A. No, sir, that would be the discounted or present worth, what we call a present worth of the property.

Q. All right, sir. That would be present worth, but how much could you sell it for on the market?

A. SOME FRACTION OF THAT, AND THEN WE GET INTO THINGS THAT ARE PRETTY NEBULOUS AND I CAN ONLY ANSWER THAT IN GENERAL TERMS.

GOOD PRODUCING PROPERTIES THAT HAVE AN ESTABLISHED DECLINE, AND THERE IS LITTLE OR NO SPECULATIVE VALUE, SPECULATION INVOLVED IN IT, COULD—IT'S FRE-

QUENTLY SOLD FOR TWO-THIRDS OF THE DISCOUNTED VALUE OR TWO-THIRDS OF THE PRESENT WORTH, WHICH IN MY OPINION IN THIS PARTICULAR CASE WOULD BE IN THE ORDER OF $324,000.

Q. SO IT WOULD GO DOWN IF YOU WERE GOING TO SELL IT FROM THE $700,000-AND SOME YOU MENTIONED TO $324,000, IS THAT RIGHT, SIR?

A. YES.

Q. WOULD YOU PUT YOUR ANSWER SO THE REPORTER CAN PUT IT IN THE RECORD?

A. YES, SIR, THAT IS CORRECT. * * *" (Emphasis supplied.)

Q. (By Mr. Ogden) I didn't ask you one question, and I would like to ask it. How much will you give for that lease right now, in the shape it's in, as an oil man?

A. How much would I pay for the lease right now?

Q. Today, or any time in the next few days.

A. Well, I couldn't afford to pay what I think it's worth, but I would recommend to one of my clients at least $250,000. * * *"